**STATE BAR OF CALIFORNIA**
**COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT**

***MEETING SUMMARY - OPEN SESSION***

**Friday, December 7, 2007**
(9:15 am - 5:00 pm)

**LA–State Bar Office**
**1149 South Hill Street**
**Los Angeles, CA 90015**

**MEMBERS PRESENT:** Harry Sondheim (Chair); Linda Foy (by telephone); JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo (by telephone); Jerry Sapiro; Dominique Snyder; Mark Tuft (by telephone); and Paul Vapnek.

**MEMBERS NOT PRESENT:** Kurt Melchior.

**ALSO PRESENT:** John Amberg (COPRAC Liaison); David Bell (Morrison & Foerster) (by telephone); George Cardona (Acting U.S. Attorney, C.D. California); Randall Difuntorum (State Bar Staff); Doug Hendricks (Morrison & Foerster) (by telephone); Diane Karpman (Beverly Hills Bar Association Liaison); Prof. Kevin Mohr (Commission Consultant);Toby Rothschild (LACBA & Access to Justice Commission Liaison);

## I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE NOVEMBER 2-3, 2007 MEETING

The November 2-3, 2007 open session meeting summary was deemed approved.

## II. REMARKS OF CHAIR

### A. Chair's Report

The Chair announced the appointment of three Board liaisons: William Hebert; Rex Heinke; and Michael Marcus. The Chair welcomed Michael Marcus to the meeting and led introductions of all persons present.

### B. Staff's Report

Staff reported that the Board's Committee on Regulation, Admissions and Discipline would be meeting on December 13, 2007 to discuss recommendations on proposed new Rule of Professional Conduct 3-410 (re Insurance Disclosure); and the State Bar's report to the Supreme Court of California concerning *Frye v. Tenderloin Housing Clinic* (2006) 38 Cal.4th 23.

## III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 3 RULES)

### A. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

The Commission considered Draft 9.4 of proposed Cmt. [32] to Rule 1.7 (dated November 17, 2007). The Chair welcomed David Bell and Doug Hendricks who attended by telephone to address this rule. The Chair also welcomed George Cardona. Mr. Kehr briefly summarized the revised comment and led a discussion of the issues raised by Commission members and interested persons. The following decisions were made in revising Cmt. [32].

(1) Regarding factor #2 "experience as a user of legal service," the language was revised to refer to: "the client's degree of experience as a user of legal service, including the type of legal services involved. . ." (6 yes, 2 no, 3 abstain).

(2) A recommendation to add a factor expressly referring to "the client's sophistication," was considered but not approved (5 yes, 6 no, 2 abstain).

(3) The Commission authorized the codrafters to add the concept of a factor that would attempt to capture "client sophistication" by recasting it as "the client's capacity to understand the nature of an advance waiver including education and language ability, . ." (11 yes, 1 no, 1 abstain). It was understood that the codrafters would be free to develop the exact language for this new factor.

(4) A recommendation to delete the characterization of in-house counsel as "independent counsel" was considered but not approved (3 yes, 9 no, 0 abstain).

(5) The language addressing the client's opportunity to seek the advice of an independent lawyer was revised to track the similar language in RPC 3-300 (9 yes, 3 no, 0 abstain).

(6) Regarding factor #4, the reference to "independent counsel" was revised to include the concept of the "the client's choice" of counsel similar to the language used in RPC 3-300 (8 yes, 4 no, 0 abstain).

(7) The language describing the disclosure to be made to a client was modified to include the concept of "whether there will be any limitation on the scope of consent" (7 yes, 3 no, 2 abstain).

(8) The Commission authorized the codrafters to replace references to a client's consent as being "binding" or "effective" with a more limited reference to the concept of "compliance with the rule" (11 yes, 0 no, 1 abstain). It was understood that the codrafters would be free to develop the exact language for implementing this change throughout Cmt. [32].

(9) The following members expressed dissents to the Commission's action. Mr. Tuft objected to the formulation of a conflicts rule that is unique and not likely to promote compliance. Mr. Tuft indicated his preference for a rule that would address both the civil and disciplinary consequences of conflicts. Mr. Lamport objected to the inclusion of an advance waiver standard that appears to be broader that what is provided for in current California case law. Mrs. Julien generally objected to the inclusion of a comment on advance waivers.

With the above revisions, there was no objection to the Chair deeming the rule and comments approved. The codrafters were asked to submit a final version of the rule.

[Intended Hard Page Break]

## B. Consideration of Rule 4-100 [ABA MR 1.15] Preserving Identity of Funds and Property of a Client

The Commission considered Draft 8 of proposed Rule 1.15 (dated November 7, 2007). Ms. Peck indicated that most of the rule had been approved at prior meetings and led a discussion of the open issues. The following drafting decisions were made.

(1) Regarding the general issue of including definitions of certain terms in the rule (i.e., "property," "client," "beneficiary" and other terms), the Chair asked the codrafters to include recommendations in the next draft addressing whether it is preferred to place such definitions in the comments or in the rule text.

(2) In the last sentence of paragraph (e), there was no objection to ending that sentence with the phrase "that is not a trust account."

(3) There was no objection to deeming paragraph (g)(2) approved as drafted.

(4) There was no objection to codrafters' inclusion of the concept of "entrusted" funds subject to the elaboration and explanation of that term in the comments.

(5) In paragraph (g)(5), there was no objection to adding "but" to second line after "lawyer."

(6) In paragraph (m)(4), the term "entrusted" was deleted based on the rationale that the paragraph is intended to capture the duty to account for funds not held in a client trust account (see *In the Matter of Fonte Fonte* (Review Dept.1994) 2 Cal. State Bar Ct. Rptr. 752), such as advances for fees (12 yes, 0 no, 1 abstain).

(7) In paragraph (m)(4), subpart (i), the addition of the phrase "or description" to further describe "amount" was deemed approved.

(8) In paragraph (m)(4), subpart (ii), the addition of the phrase "or description" to further describe appropriate statements of the distribution of trust property was approved (9 yes, 0 no, 3 abstain). An analogous change also was made to subpart (iii) (12 yes, 0 no, 0 abstain).

With the above revisions, there was no objection to the Chair deeming the rule approved subject to those few issues where the Commission's approval expressly was made subject to the drafting of the comments. Those issues were: (1) the meaning of the term "entrusted;" and the possible inclusion of express definitions for certain terms such as "property," "client," and "other person" (which had been substituted for the word "beneficiary" in an earlier draft). The codrafters were asked to prepare a final version of the rule for submission to staff and to prepare draft comments for consideration at the next meeting.

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## C. Consideration of Rule 5-100 [no ABA counterpart] Threatening Criminal, Administrative or Disciplinary Charges

The Commission considered Draft 2 of proposed amended rule 5-100 (dated November 18, 2007). Mr. Sapiro led a discussion of the open issues and the following drafting decisions were made.

(1) In Cmt. [1], the first sentence was revised to read: “This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action." (11 yes, 0 no, 2 abstain).

(2) In Cmt. [2], was revised (9 yes, 0 no, 2 abstain) to read:

> “Whether a lawyer’s statement violates paragraph (a) depends on the specific facts. See, e.g., *Crane v. State Bar* 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue “all available legal remedies” by itself does not violate paragraph (a).”

(3) Regarding the issue of whether to include a comment that creates a safe harbor for a lawyer to cite disciplinary rules to another lawyer, the codrafters were asked to include recommended language in the next draft.

(4) In Cmt. [3], regarding the deletion of the phrase “where there is probable cause” was referred to the codrafters for further consideration and drafting. It was noted that in negotiating a civil enforcement action, a government prosecutor would have no intent to make a threat so as to gain an advantage; instead, the target of the investigation often will be the person who initiates discussion of issues that seem to require a warning about prosecutorial consequences that the target may not realize.

Following discussion, the Chair asked the codrafters to prepare a revised draft of a proposed amended rule in accordance with the guidance provided by the Commission. In particular, the Chair asked the codrafters to include a recommendation for a new rule number that would be appropriate given the Commission’s tentative decision to use the ABA rule numbering system.

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**D. Consideration of Rule 5-110 [including all of ABA MR 3.8] Performing the Duty of Member in Government Service**

The Commission considered a first draft of proposed amended rule 5-110 (dated November 20, 2007). Ms. Foy led a discussion of the issues raised in Mr. Kehr's December 3, 2007 email message and the following drafting decisions were made.

(1) At the very start of the rule, deleting the word "The" and inserting the word "A" was deemed approved.

(2) By consensus, it was determined that the rule would be limited to prosecutors and not expanded to cover other government lawyers.

(3) Regarding the proposed addition of the concept of causing charges to be instituted, such as activity before a grand jury, the codrafters asked to make a recommendation in the next draft after considering the information found in the U.S. Attorney Manual (to be provided by Mr. Cardona) and also New York's proposed Rule 3.8 (to be provided by Mr. Tuft).

(4) The codrafters were asked to add the concept of selective, discriminatory, or retaliatory prosecution in the next draft (8 yes, 0 no, 3 abstain)

(5) The Commission considered whether the scope of the rule should be expanded to cover a "threat" to institute charges that are lacking in probable cause; however, there was no motion made to pursue this expansion.

(6) The Commission considered whether to track the proposed New York rule that replaces the probable cause requirement with a standard prohibiting a charge that "cannot be supported by evidence sufficient to establish a prima facie showing of guilt;" however, there was no motion made to make this change.

(7) In paragraph (a), a recommendation to not add the bracketed language concerning "dropping a charge" was approved (9 yes, 0 no, 1 abstain).

(8) In paragraph (a), a recommendation to not add the bracketed language concerning the bringing of "multiple charges" was approved (10 yes, 0 no, 0 abstain).

(9) Regarding the issue of addressing certain constitutional matters (such as a Brady violation), the codrafters were asked to consider the Commission's discussion and make a recommendation in the next draft. Among the suggested approaches was to replace paragraph (d) (which is from MR 3.8) with the standard in Business and Professions Code section 6068(o)(7).

Following discussion, the Chair asked the codrafters to implement the agreed upon changes in a revised draft.

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## E. Consideration of Rule 5-120 [ABA MR 3.6)] Trial Publicity

The Commission considered a November 20, 2007 memorandum from Mr. Lamport reporting on RPC 5-120 rule amendment issues. Mr. Lamport led a discussion of the issues. The following decisions were made to give guidance to the codrafters.

(1) As a threshold policy determination, the Commission decided to retain a rule like RPC 5-120 (8 yes, 4 no, 1 abstain).

(2) In paragraph (a), the standard was changed to track MR 3.6 by deleting the "expect to be disseminated" and using "knows or reasonably should know" (13 yes, 0 no, 0 abstain).

(3) In paragraph (a), romanets ("(i)" and "(ii)") were added to clarify that the objective knowledge standard applies to both dissemination by public means and likelihood of prejudice (8 yes, 4 no, 1 abstain).

(4) Regarding the possible change to an express "clear and present danger" standard, the codrafters were asked to survey the states and report back. It was noted that some states have preferred this standard over the ABA language.

(5) A recommendation to delete that part of the rule that covers publicity about an investigation (as opposed to litigation) was considered but not adopted (3 yes, 6 no, 3 abstain).

(6) A recommendation to replace "adjudicative proceeding" with "criminal or civil jury trial" was considered but not adopted (5 yes, 7 no, 0 abstain).

(7) A recommendation to delete that part of the rule that might be construed to cover "lawyers who have participated" in a case or matter but who are no longer involved, was referred to the codrafters for study and a recommendation in the next draft.

Following discussion, the Chair asked the codrafters to prepare a first draft of a proposed amended rule consistent with the guidance provided by the Commission.

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## F. Consideration of Rule 5-200 [including all of ABA MR 3.3] Trial Conduct

The Commission considered Draft 2.1 of proposed Rule 3.3 (dated November 14, 2007). Justice Ruvolo led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), to track the ABA, the phrase ""In presenting a matter to a tribunal" was deleted and replaced with "a lawyer shall not knowingly"(8 yes, 2 no, 2 abstain).

(2) In paragraph (a)(2) the codrafters were asked to add the concept of a "material misquote" (12 yes, 0 no, 1 abstain).

(3) At the end of paragraph (a)(4), deleting the word "and" and inserting the word "or" was deemed approved.

(4) In paragraph (a)(4), the Commission considered deleting or defining the term "overrule" but there was no recommendation to make this change.

(5) In paragraph (c), the issue of whether to retain the phrase "or upon termination" was referred back to the codrafters for further consideration; however, it was agreed that the word "upon" would be deleted.

(6) In paragraph (d), the word "material" was retained (8 yes, 0 no, 2 abstain).

(7) In paragraph (d), the phrase "know or should know" was replaced with "reasonably should know" (9 yes, 1 no, 1 abstain).

(8) In paragraph (d), the issue of whether to add a definition of the term "ex parte" was referred to the codrafters for further consideration.

(9) Paragraph (a)(5) was removed from this rule so that it can be added to proposed Rule 3.4 (6 yes, 1 no, 2 abstain). It was understood that comments to this rule and proposed Rule 3.4 could include mutual cross-references.

Following discussion, the Chair asked the codrafters to implement the agreed upon changes in a revised draft. It was understood that the issues concerning the rule had been completed and that a first draft of the proposed comments would be considered at the next meeting. Governor Marcus indicated that he would send the codrafters a State Bar Court Review Department decision concerning trial conduct in ex parte matters that would be relevant to paragraph (a)(3) of the proposed rule.

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## G. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness

The Commission considered Draft 1.2 of proposed Rule 3.7 (dated November 18, 2007). Ms. Snyder led a discussion of the open issues and the following drafting decisions were made.

(1) In the introductory rule text, to track the ABA, the phrase "adjudicative proceeding" was replaced with "at a trial" (11 yes, 0 no, 1 abstain). Ms. Peck, Mr. Sapiro, and Mr. Vapnek dissented to this change and were of the view that the rule should retain the status quo of RPC 5-210 and be strictly limited to jury trials.

(2) In the introductory rule text, the phase "is likely to be a necessary witness" was deleted and replaced with "knows or reasonably should know that the lawyer will be called as a witness unless" (7 yes, 2 no, 2 abstain).

(3) In paragraph (c), the phrase "and shall be consistent with principles of recusal" was deleted (8 yes, 0 no, 3 abstain).

(4) In Cmt. [1], the deletion of the first sentence was deemed approved. In the last sentence, deleting the phrase "is intended to" was deemed approved and the codrafters were also authorized to revise the sentence to clarify that it applies only to witnesses on the merits of a case.

(5) In Cmt. [2], using the phrase "knows or reasonably should know" was deemed approved to conform to the revised language of the introductory text. Also in Cmt. [2], the deletion of the phrase "on behalf of the lawyer's client" was deemed approved and the replacing "in litigation" with "at trial" was deemed approved.

(6) In paragraph (c), the codrafters were asked to add the concept of "informed consent" (9 yes, 2 no, 0 abstain). Also in paragraph (c), the term "written" was added to modify "informed consent" (10 yes, 2 no, 0 abstain). In addition, a recommendation to not include the concept of "an opportunity to seek the advice of independent counsel" was adopted (8 yes, 0 no, 1 abstain).

(7) In Cmt. [2], the language requiring that "consent be filed with the court" was deleted (9 yes, 1 no, 2 abstain).

(8) The issue of including MR 3.7 Cmt. [6] (re a definition of "informed written consent") was referred to the codrafters to make a recommendation in the next draft. It was noted that one approach would be to refer to another appropriate place in the rules, such as: a global definition in the anticipated terminology rule; a definition in rule 1.7; or a definition in rule 1.4.

Following discussion, the Chair asked the codrafters to implement the agreed upon changes in a revised draft.

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## H. Consideration of Rule 5-220 [including all of ABA MR 3.4] Suppression of Evidence

The Commission considered a first draft of proposed Rule 3.4 (dated November 18, 2007). Mr. Martinez led a discussion of the issues raised by the Consultant in his November 25, 2007 email message and by Mr. Kehr in his November 3, 2007 email message. The following drafting decisions were made.

(1) Regarding the issue of a proposed standard addressing the propriety of requesting a waiver of the attorney-client privilege, it was agreed that the Commission would not act on this issue at this time. It was observed that the ABA House of Delegates will be considering a report from the ABA Criminal Justice Section on prosecutorial practices (see ABA House of Delegates Report #105D) at its 2008 mid-year meeting and that the United States Congress is considering federal legislation concerning the attorney-client privilege (see S.186 (Specter) and H.R. 3013 (Scott).

(2) In Cmt.[1], the codrafters were asked to replace the first sentence with the first sentence found in Cmt. [1] to MR 3.4 (8 yes, 3 no, 1 abstain).

(3) In Cmt. [3]: the first sentence was deleted; the second sentence was revised to refer to both civil and "criminal" disputes in the two places where the language used in the draft only refers to "civil disputes"; and the word "necessarily" was replaced with "by itself" (10 yes, 0 no, 1 abstain).

(4) The codrafters were asked to include the concept of Cmt. [4] to MR 3.4 (5 yes, 3 no, 2 abstain).

Following discussion, the Chair asked the codrafters to implement the agreed upon changes in a revised draft.